

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH  
NORTHERN DIVISION

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREGORY DEAN BUCK,

Defendant.

ORDER DENYING DEFENDANT'S  
MOTION FOR HEARING  
PURSUANT TO  
*FRANKS V. DELAWARE*

Case No. 1:19-CR-11

Judge Dee Benson

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Defendant Gregory Dean Buck has filed a motion for a *Franks* hearing.<sup>1</sup> (Dkt. 19.) In his motion, Defendant requests an evidentiary hearing concerning the veracity of the affidavit underlying the warrant relied upon to search his residence. He argues that Agent Gill, the affiant, knowingly or recklessly omitted material information from the affidavit and also knowingly or recklessly included false statements in the affidavit. Defendant additionally claims that these false material statements and omitted material facts were so significant that their

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<sup>1</sup>Within the same document, Defendant included a motion to suppress regarding the search of his vehicle on two separate occasions. (Dkt. 19 at 3, 4.) At Defendant's detention review hearing, the parties and Court agreed to first address Defendant's motion for a *Franks* hearing. Defendant's motion to suppress remains outstanding.

presence or absence would negate a finding of probable cause and therefore all evidence resulting from the execution of the warrant should be suppressed.

### **LEGAL PRINCIPLES**

Although there is a presumption of validity with respect to the affidavit supporting a search warrant, in *Franks v. Delaware*, 438 U.S. 154 (1978), the United States Supreme Court held that in certain circumstances a defendant may challenge the affidavit used to procure a search warrant. *Id.* at 155, 171. The Supreme Court explained, however, that a defendant is not automatically entitled to an evidentiary hearing on the matter; first, the defendant must make the requisite “substantial preliminary showing.” *Id.* at 155.

The Supreme Court explained that in order to obtain a *Franks* hearing, the defendant must make a substantial preliminary showing: (1) that the affiant “knowingly or intentionally, or with reckless disregard for the truth,” included a false statement in the warrant affidavit; and (2) that “the allegedly false statement is necessary to the finding of probable cause.” *Franks*, 438 U.S. at 155-56.

If the defendant makes this substantial preliminary showing and demonstrates to the court that he is entitled to a *Franks* hearing, the defendant must then prove these same allegations at the *Franks* hearing by a preponderance of the evidence. *See id.* at 156. And finally, if the defendant satisfies his burden of proof at the hearing, then the search warrant “must be voided and the fruits of the search excluded.” *Id.* Significantly, the United States Court of Appeals for the Tenth Circuit has ruled that the standards of “deliberate falsehood” and “reckless disregard” set forth in *Franks* apply to “material omissions, as well as affirmative falsehoods.” *Stewart v.*

*Donges*, 915 F.2d 572, 582 (10<sup>th</sup> Cir. 1990); see *United States v. Kennedy*, 131 F.3d 1371, 1376 (10<sup>th</sup> Cir. 1997) (“[U]nder *Franks* and *Stewart* a court may look behind a search warrant when the affiant intentionally or recklessly misleads the magistrate judge by making an affirmatively false statement or omits material information that would alter the magistrate judge’s probable cause determination.”).

“To mandate [a *Franks*] hearing, the challenger’s attack must be more than conclusory and must be supported by more than a mere desire to cross-examine.” *Franks*, 438 U.S. at 171. The defendant must “point out specifically the portion of the warrant affidavit that is claimed to be false” and offer a “statement of supporting reasons.” *Id.* These allegations should be supported by “an offer of proof” in the form of “[a]ffidavits or sworn or otherwise reliable statements of witnesses” or an explanation as to their absence. *Id.* Moreover, “even upon a showing of perjury or reckless disregard, if the false statements or omissions of which the defendant complains would not alter the probable cause determination, the defendant is not entitled to a *Franks* hearing.” *Id.*

### **DISCUSSION**

Applying the principles set forth above, the Court concludes that Defendant has not met his burden of proof to support his request for a *Franks* hearing. Significantly, Defendant has not made any offer of proof. His motion was not accompanied by affidavits, sworn or otherwise reliable witness statements, or an explanation as to their absence as required by the procedure set forth in *Franks*.<sup>2</sup> This defect alone renders Defendant’s motion insufficient to satisfy the

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<sup>2</sup> Additionally, Mr. Buck did not attach a copy of the challenged affidavit. Instead, Defendant’s recites only those paragraphs that he claims contain material false statements or

requisite preliminary showing. *See United States v. McKnight*, No. 99-cr-83, 2000 WL 33363284, \*2 (D. Utah Feb. 17, 2000).

Beyond Defendant's failure to make an offer of proof or an explanation for its absence, Defendant's motion fails for the additional reason that Defendant fails to identify any deliberately false material statements or omitted material facts. Rather, Defendant simply identifies what he perceives to be inconsistencies, misstatements, or omissions in Agent Gill's affidavit, and then states in conclusory fashion that these statements and omissions were both deliberate and material.

#### Material Omissions

For example, most of the "material omissions" of which Defendant complains are instances in which Defendant suggests that Agent Gill failed to include adequate supporting detail or corroborating information. Specifically, Defendant claims Agent Gill made material omissions by "failing to provide any personal corroboration of a controlled buy," failing to "attest to the veracity" of the Confidential Informant involved in the controlled buy, and "failing to attest to the basis of knowledge" of other officers involved in the investigation. (Dkt. 19 at 2.) Defendant then insinuates that because the affidavit omits this "verification," the corresponding facts in the affidavit should be deemed untruthful and unreliable. (Dkt. 19 at 3.)

As an initial matter, Defendant's criticism of Agent Gill's lack of corroborating detail does nothing to affirmatively support Defendant's insinuation that the facts obtained through the CI and other officer reports were actually false or unreliable, nor does it affirmatively show that

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material omissions.

the alleged deficiencies were material.

Additionally, Agent Gill expressly states in the affidavit that he personally “investigated several controlled buys,” which the government proffers included the one in question (Dkt. 23 at n.1), and the affidavit also refers to an audio-video recording of the controlled buy, which would have been used to corroborate what the CI and other officers reported. (Dkt. 23-1, Gill Affidavit at 3.) Moreover, viewing the affidavit in its entirety, and considering the length and breadth of the investigation, it is apparent that the statements and facts contained therein come from either Agent Gill’s personal knowledge or his reasonable reliance on the reports and information provided by other officers and agents who were involved in the on-going investigation.

Defendant’s additional claims of material omissions are entirely without merit. Defendant claims that the following information, had it been included, would have been relevant to the probable cause determination: (1) the “many instances [in] which Agent[s] conducted surveillance of Mr. Buck’s residence in which no suspicious activity was detected between 7/13/17 and 3/15/18”; (2) there were “vehicles that were stopped leaving Mr. Buck’s residence in which no drugs [were] located”; and (3) there were instances of electronic surveillance “which appear to have not provided any evidence of illegal activity.” (Def.’s Mot. at 6.) Instances of non-criminal conduct by the Defendant are simply not relevant to a probable cause determination. *See, e.g., United States v. Soderstrand*, 412 F.3d 1146, 1152 (10<sup>th</sup> Cir. 2005) (“An affidavit establishes probable cause . . . if the totality of the information it contains establishes the fair probability that contraband or evidence of a crime will be found in a particular place.”). Accordingly, the failure to include non-criminal conduct is not a material

omission under *Franks*.

Intentionally False or Misleading Material Statements

Similarly, the Defendant's allegations of intentionally false or misleading statements are also insufficient to make a preliminary showing. For example, Mr. Buck claims that Agent Gill made an intentional and deliberate false material statement when Agent Gill stated that the search of the vehicle resulted in the discovery of a "vacuum tube" containing a "distributable amount of meth . . . which [Defendant] took ownership of." (Dkt. 23-1, Aff. at 4.) Interestingly, Defendant does not contest that he admitted to ownership of the methamphetamine, nor does he contest that there was a positive field test for methamphetamine. He simply challenges the statement that there was a "distributable" amount. (Def.'s Mot. at 5.)

Review of the affidavit shows that Agent Gill's statement that there was a "distributable amount of methamphetamine" was made in reliance on information provided by the deputies at the scene who actually conducted the search. Although it was later discovered that the tube discovered in the vehicle contained only residue, Agent Gill's statement did not amount to intentional or reckless disregard for the truth. Law enforcement agents routinely work together in drug investigations, and routinely rely on the personal knowledge of other investigators. There is simply no evidence that Agent Gill knew, based upon the information he had when he drafted the affidavit, that the tube contained only residue. Moreover, the significance of the vehicle search was not dependent on the *amount* of methamphetamine discovered, but rather the fact that there was evidence of a controlled substance – methamphetamine – in Defendant's car. Whether that amount was a distributable amount or residue is immaterial for a probable cause

determination.

**CONCLUSION**

Because Mr. Buck has not made the substantial preliminary showing required to obtain a *Franks* hearing, the Court DENIES his motion.

With regard to Defendant's remaining Motion to Suppress, the parties are instructed to contact the Court to schedule an evidentiary hearing to address Defendant's claim that searches of Mr. Buck's vehicles (on February 23, 2018 and March 15, 2018) were unlawful under *Florida v. Harris*, 568 U.S. 237 (2013).

IT IS SO ORDERED.

DATED this 10th day of May, 2019.

A handwritten signature in black ink that reads "Dee Benson". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Dee Benson  
United States District Judge